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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/522,148	01/24/2005	Mate Hidvegi	3494-0104PUS1	9131
2292	7590	02/11/2008	EXAMINER	
BIRCH STEWART KOLASCH & BIRCH			DAVIS, DEBORAH A	
PO BOX 747			ART UNIT	PAPER NUMBER
FALLS CHURCH, VA 22040-0747			1655	
NOTIFICATION DATE		DELIVERY MODE		
02/11/2008		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

mailroom@bskb.com

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/522,148	HIDVEGI ET AL.
	Examiner	Art Unit
	Deborah A. Davis	1655

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### **Status**

- 1) Responsive to communication(s) filed on 16 January 2008.
- 2a) This action is FINAL.                            2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### **Disposition of Claims**

- 4) Claim(s) 16-21,30 and 37 is/are pending in the application.
- 4a) Of the above claim(s) 22-29 and 31-36 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 16-21,30 and 37 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### **Application Papers**

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/ are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### **Priority under 35 U.S.C. § 119**

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
  1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### **Attachment(s)**

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO/SB/08)  
 Paper No(s)/Mail Date \_\_\_\_\_.
- 4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) Notice of Informal Patent Application
- 6) Other: \_\_\_\_\_.

## DETAILED ACTION

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on January 16, 2008 has been entered.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 16-21, 30 and 37 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Hidvegi et al (WO 99/08694) for reasons of record and restated below.

A method of enhancing weight gain and efficiency of feed conversion in a farm animal comprising feeding a fodder to a farm animal wherein the fodder comprises an extract of fermented wheat germ, and wherein enhancing weight gain and efficiency of feed conversion is effected by the fermented wheat germ extract is apparently claimed.

Hidvegi et al. teach a fermented wheat germ extract obtained by fermenting wheat germ with *Saccharomyces cerevisiae*, including in a form known as a "dried vegetal material" and that the dried vegetal material can be within the food industry - e.g., a dietary supplement (see, e.g., page 5, line. 29 - page 6, line 4). Hidvegi et al. do not expressly teach adding the fermented wheat germ extract to fodder (to enhance weight gain), as instantly claimed.

However, the cited reference beneficially teaches that the fermented wheat germ extract is therapeutically useful as an immunostimulatory agent when administered to animals (see entire document including Abstract, Examples, Claims).

It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to add a therapeutically effective amount of the wheat germ extract taught by Hidvegi et al. to fodder (animal feed) so as to provide the immunostimulatory effect to farm animals based upon the beneficial teachings provided by the cited reference. The adjustment of particular conventional working conditions (e.g., determining an effective amount of fermented wheat germ extract therein) is deemed merely a matter of judicious selection and routine optimization, which is well within the purview of the skilled artisan. Please note that giving a farm animal the dried vegetal material (i.e., fermented wheat germ extract) within a food such as fodder would intrinsically enhance weight gain therein (as instantly claimed).

Thus, the invention as a whole is *prima facie* obvious over the reference, especially in the absence of evidence to the contrary.

***Response to Argument***

Applicant's arguments filed January 16, 2008 have been fully considered but they are not persuasive.

Applicant reiterates arguments against the reference of Hidvegi et al from the previous Office Action dated November 16, 2008 and is restated below.

Applicant argues that a dietary supplement is usually applied to preserve the health and not to enhance the body weight of an animal. Applicant argues that based on Hidvegi's teaching, the body weight enhancing effect of dried material is only an assumption of the Examiner, since this effect is neither expressly mentioned nor supported by any data in Hidvegi. This argument is not persuasive because enhancing body weight can be a part of preserving the health of the animal. The body weight enhancing effect of dried material taught by Hidvegi is not based on the Examiner's assumption but on a conclusion of obviousness based on the fact that giving a farm animal the dried vegetal material (i.e., fermented wheat germ extract) within a food such as fodder would intrinsically enhance weight gain because the vegetal material appears to be the same product as instantly claimed and therefore should have the same functional effect. Applicant argues that Hidvegi does mention weight in its teaching but only that the animals did not gain any. This argument is not persuasive because the Examiner has interpreted this teaching of Hidvegi to mean the weight of the organs after being retrieved from the animals did not change nor were they damaged. This teaching was not in reference to weight gain in animals. In response to applicant's argument that there is no motivation to add fermented wheat germ to animal feed to enhance weight

gain in an animal is not persuasive. The fact that applicant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985). Applicant has claimed criticality in the ranges of the wheat germ extract and unexpected results of weight gain in the animals. These arguments have been fully considered but not found to be persuasive because to establish unexpected results over a claimed range, applicants should compare a sufficient number of tests both inside and outside the claimed range to show the criticality of the claimed range. *In re Hill*, 284 F.2d 955, 128 USPQ 197 (CCPA 1960). With respect to the argument of unexpected results are not persuasive because the burden is on applicant to establish that results are unexpected and of significance. The mere statement of unexpected significant weight gain in the animals is not a demonstration of evidence and therefore not sufficient to rebut a case of obviousness.

Applicant was scheduled for an interview on January 31, 2008 but requested to cancel the interview. Applicant is encouraged to reschedule accordingly.

***Conclusion***

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Deborah A. Davis whose telephone number is (571) 272-0818. The examiner can normally be reached on 8-5 Monday thru Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on (571) 272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
Deborah A. Davis  
Patent Examiner  
Art Unit 1655  
January 2008

  
CHRISTOPHER R. TATE  
PRIMARY EXAMINER